

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PERRY HOWE, et al.,  
Plaintiffs,

v.

PNC BANK, N.A., et al.,  
Defendants.

Case No. 13-cv-05476-VC

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. Nos. 19 and 20

Plaintiffs Perry and Karina Lee Howe have sued PNC Bank, N.A., and HSBC Bank USA, N.A., as trustee for Luminent Mortgage Trust 2007-2, Mortgage Pass Through Certificates, Series 2007-2 ("Defendants"), to contest the foreclosure proceedings initiated by defendants. The defendants filed a motion to dismiss the original complaint, which Judge White granted, with leave to amend. The Howes then filed a First Amended Complaint (FAC) and defendants have filed a motion to dismiss and motion to strike. The motion to dismiss is GRANTED, and the case is dismissed with prejudice.<sup>1</sup>

The FAC is largely premised on the theory the Howes set forth in their original complaint, namely, that because their mortgage was securitized none of the defendants had authority to foreclose on the property. Judge White's order dismissed all claims based on this securitization theory and granted leave to amend to challenge the foreclosure proceedings only if the Howes could allege facts in support of a different theory. (Docket No. 17). The Court therefore only addresses claims that do not arise out of the securitization theory.

---

<sup>1</sup> Because the court is dismissing the complaint, the court DENIES the motion to strike as MOOT.

1 First, the Howes allege that defendants do not have a right to foreclose on their property  
2 because they have violated various sections of the California Commercial Code. (FAC, ¶ 53).  
3 Second, the Howes attempt to bolster their fraud claim by pleading additional information  
4 regarding PNC's alleged misrepresentation that it was willing to renegotiate the Howes' loan. This  
5 fraud claim is connected with a series of letters between the Howes and PNC, in particular the  
6 correspondence from PNC dated September 18, 2013. (FAC, ¶¶ 77-82). Third, the Howes allege  
7 that this letter constituted a contract between them and PNC, and by refusing to renegotiate the  
8 loan PNC breached the contract. (FAC, ¶¶ 101-106).

10 1. The California Commercial Code claim is based on the requirements set forth in Articles  
11 3 and 9 of the Uniform Commercial Code, which California has adopted. The Howes claim that  
12 because the Note and Deed of Trust to their property were separated, defendants are not "persons  
13 entitled to enforce the note" under the California Commercial Code, and thus have no interest in  
14 the property and cannot foreclose on it. But the California Commercial Code is not applicable to  
15 nonjudicial foreclosures in California. Rather, nonjudicial foreclosures are exhaustively governed  
16 by California Civil Code § 2924 *et. seq.* See *Debrunner v. Deutsche Nat. Trust Co.*, 204  
17 Cal.App.4th 433, 440(2012). And as Judge White's order notes, under California Civil Code §  
18 2924, the "foreclosing party does not need to possess or produce the original promissory note in  
19 order to conduct a trustee sale." (Docket No. 17).

22 2. With respect to the fraud claim, Judge White's order granted leave to amend only for the  
23 alleged misrepresentation about the loan modification, not the alleged fraudulent assignment of the  
24 Note. The Howes have added new information in their FAC about their response to the allegedly  
25 fraudulent letter sent by PNC on September 18, 2013. However, they still have not alleged  
26 sufficient facts to suggest a possibility of fraud. Their complaint does not demonstrate how PNC  
27 intended to induce them to rely on the alleged misrepresentation or how they relied on it, both of  
28

1 which are necessary elements of fraud. *See Lovejoy v. AT&T Corp.*, 92 Cal. App. 4<sup>th</sup> 85, 93  
2 (2001). And the letter itself belies the allegation that the letter misled the Howes, because it  
3 stated: "Please note that the normal collection and/or foreclosure activity will continue on your  
4 loan while your request is being reviewed." (Docket No. 18, Exhibit "M").

5 3. Finally, the Howes claim this September 18, 2013 letter was a contract between them  
6 and PNC whereby PNC agreed to renegotiate the loan, and PNC's failure to negotiate in good faith  
7 constituted a breach of that contract. However, the letter does not include any terms, promises, or  
8 agreements, and there is nothing about it which would suggest it is a contract.  
9

10 Accordingly, the three remaining claims must be dismissed, and therefore the case must be  
11 dismissed. The dismissal is with prejudice, because the plaintiffs offer no explanation – and the  
12 court can conceive of none – for how they could amend their complaint to state a cause of action.  
13

14 **IT IS SO ORDERED.**

15 Dated: July 14, 2014



16  
17 VINCE CHHABRIA  
18 United States District Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28